UNITED STATES
v.
JOSEPH H. SKIDMORE

IBLA 72-423 Decided May 1, 1973

Appeal from a decision (Idaho 2558) by an Administrative Law Judge 1/ insofar as it held valid three millsite claims.

Affirmed in part; reversed in part.

Mining Claims: Mill Sites

> Where land located as a millsite is not being used for mining or milling purposes at the time the patent is applied for, the applicant must show occupation by improvement or other evidence of good faith intentions to use the land for mining or milling purposes in order to sustain his claim; where a claim has usable improvements such as bunkhouses, an ore storage dump, and a tunnel which is the access to a mine, the requirement of the statute has been met.

Mining Claims: Mill Sites

> Millsites, having only the possibility of being used as a future ore dump or location for a mill if extensive expenditures are made in renovating an existing mill and mining operations on adjoining patented lands are commenced, do not qualify for a patent and are properly declared invalid.

APPEARANCES: E. B. Smith, Esq., Smith and Daley Professional Association, Boise, Idaho, for contestees; Erol R. Benson, Esq., Office of General Counsel, Department of Agriculture, for the United States.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787.

OPINION BY MR. RITVO

The Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from a decision, dated April 25, 1972, by Administrative Law Judge L. K. Luoma, insofar as it held valid the Mammoth Nos. 1, 3, and 4 millsites. The Judge also held invalid a fourth millsite, the Mammoth No. 2, which had been included in the patent application. No appeal having been filed, the decision as to millsite No. 2 is final.

The four millsites originally comprised the Anna Lee lode mining claim. The Anna Lee was one of eight contiguous claims held by Joseph H. Skidmore, the contestee, known as the Mammoth Group situated in secs. 8, 23, 25, and 26, T. 8 N., R. 6 E., B. M., Boise County, Idaho. On March 13, 1968, Skidmore obtained a patent for seven of the eight lode claims in the Mammoth Group. The Anna Lee claim was held invalid because the land was nonmineral in character. Contestee then located the four disputed millsites, the Mammoth Nos. 1, 2, 3, and 4, on the Anna Lee. On November 4, 1968, Skidmore filed for a patent to the millsites.

The claims are situated within the Boise National Forest. The Bureau of Land Management, at the request of the United States Forest Service, filed a contest against them on March 11, 1971, charging that:

1. The mill sites are not needed, used, or occupied by the proprietor of a vein, lode, or placer for mining, milling, processing, or beneficiation purposes or other operations in connection with such claims.

2. The mill sites have no quartz reduction mill or reduction works thereon.

3. The claims are not being held in good faith for bona fide mining or milling purposes.

The hearing was held on August 16, 1971, before Judge L. K. Luoma. The Bureau of Land Management called two Forest Service employees to testify regarding their knowledge of Skidmore's mining activities. First on the stand was Anthony P. Nardi, a forester serving as Resource Assistant in the Idaho City District of the Boise National Forest. Nardi's testimony was based on three inspections of the Mammoth millsites. During these visits, Nardi observed no mining or milling activities, nor any evidence of

recent activities on the site. Transcript 17 (hereinafter Tr.). Nardi also testified that a road right-of-way withdrawal crossed Mammoth No. 4. The road was used primarily by the public for camping and recreation purposes. Tr. 18.

Additional testimony was given by Vernon T. Dow, a United States Forest Service Mining Engineer. Dow had been on the claims at least six times and observed only limited activities. The last work he reported seeing consisted of bringing cars of waste out through the tunnel, which crossed Mammoth No. millsite. This activity was observed in 1964 or 1965 -- 3 years before Skidmore's millsite application. Tr. 22-23. Dow further testified that on two of his inspections he was accompanied by his then superior, the Branch Chief in the Division of Recreation and Lands, G. Richard Plumb. Dow admitted that he and Plumb did not agree on whether the millsites qualified for patent. Plumb felt No. 4 qualified due to the existence of an old mill on the site; No. 1 qualified because of an ore dump and two old bunkhouses; and No. 3 possibly qualified because the ore dump on No. 1 was approaching No. 3. Tr. 29-30. Neither Dow nor Plumb saw any possibility of No. 2 qualifying. Tr. 33.

This difference in opinion was brought out again in the testimony by Skidmore. An undated letter addressed to Skidmore from Plumb was entered into evidence. Tr. 46-47. The letter related Plumb's opinion that millsites Nos. 1 and 4 met the requirements for patent while Nos. 2 and 3 either would not qualify or were very questionable. A more controversial letter was entered into evidence over the objection of contestant. The letter, dated April 7, 1970, was addressed to Skidmore from Eugene E. Babin, Acting Manager of the Idaho State Land Office of the Bureau of Land Management. Tr. 49. The letter assured Skidmore that his patent applications for Nos. 1, 3, and 4 would be approved. While the letter came from the office where the millsite applications were filed, there was no mention on what information Babin based his statements or under what authority he made them.

Skidmore testified that in 1920 he had inherited one half of the Mammoth claim from his father and in 1940 purchased the other one-half interest. He had produced $10,000 from the claims after acquiring ownership, but the last production from the mine was in 1935. Tr. 9. After 1952 he spent $50,000 in underground and surface work in the mining claims, Tr. 40-41, but had done nothing since 1965. Tr. 43, 44. Skidmore explained that the lack of activity on his mine in recent years resulted from inability to obtain miners willing to work on an operation limited to the summer months. Tr. 43.

Based on the evidence submitted, Judge Luoma gave the following description in his decision of the millsites and their relation to the mine:

> 1. Mammoth No. 1 - Contains the tunnel and only present access to the mine. Some of the underground machinery is presently stored in this tunnel. Also contains two bunkhouses usable for housing miners (Tr. 10-12, 43 and 51), and an ore storage dump (Tr. 45).
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> 2. Mammoth No. 3 - The ore storage dump on mill site No. 1 is spilling over or about to spill over onto the No. 3. The No. 3 is needed for future extension of the ore dump and for storage of mill tailing from the mill located on No. 4 claim. (Tr. 12, 45-46, and 52-53.)
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> 3. Mammoth No. 4 - Contains a mill used in past years for milling ore produced from the Mammoth mine. It can be restored to usable condition at considerable but not excessive expense. The plans for rehabilitation have been drawn up. (Tr. 41 and 52.)

Judge Luoma concluded that the evidence submitted indicated a substantial compliance with the millsite laws regarding Nos. 1, 3, and 4, and held them valid. In its appeal the Government's statement of reasons stresses the lack of activity on Skidmore's millsites and the absence of legal support for the Judge's decision.

Patenting nonmineral lands as millsites is authorized by 30 U.S.C. § 42 (1970). The pertinent parts of the law read as follows:

> Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made of such nonadjacent land shall exceed five acres * * *.

As Judge Luoma pointed out in his decision, the Department has held that a millsite may border on a supporting lode claim 2/ and may

2/ Yankee Mill Site, 37 L.D. 674 (1909).

be located and patented even though the lode claim with which it is associated has been previously patented. 3/

The dispute centers on whether Skidmore had sufficiently complied with the law's requirement that the lands be "used or occupied * * * for mining or milling purposes." In several of the previous decisions, the Department has enlarged upon the statutory language. In Charles Lennig, 5 L.D. 190, 192 (1886), the Secretary stated:

> The second clause of this section manifestly makes the right to patent a mill site dependent upon the existence on the land of a quartz-mill or reduction-works. But the terms of the first clause are more comprehensive. Under them it is not necessary that the land be actually a "mill-site". They make the use or occupation of it for mining or milling purposes the only pre-requisite to a patent. The proprietor of a lode undoubtedly "uses" non-contiguous land "for mining or milling purposes" when he has a quartz-mill or reduction-works upon it, or when in any other manner he employs it in connection with mining or milling operations. For example, if he uses it for depositing "tailings" or storing ores, or for shops or houses for his workmen, or for collecting water to run his quartz-mill, I think it clear that he would be using it for mining or milling purposes. I am also of opinion that "occupation" for mining or milling purposes, so far as it may be distinguished from "use," is something more than mere naked possession, and that it must be evidenced by outward and visible signs of the applicant's good faith. The manifest purpose of Congress was to grant an additional tract to a person who required or expected to require it for use in connection with his lode; that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it. Therefore, when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith [**10] for mining or milling purposes.

In Alaska Copper Co., 32 L.D. 128, 131 (1903), the Acting Secretary wrote:

> * * * A millsite is required to be used or occupied distinctly and explicitly for mining or milling purposes in connection with the lode claim with which it

3/ Eclipse Mill Site, 22 L.D. 496 (1896).

> is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of mining or some feature of milling must be performed upon, or some recognized agency of operative mining or milling must occupy, the millsite at the time patent thereto is applied for to come within the purview of the statute. * * *

Since none of the mining claims are being operated, the appellant is not using the millsites for mining and milling purposes. United States v. S.M.P. Mining Co., 67 I.D. 141, 144 (1960). Therefore, to satisfy the statute he must show, as to each millsite, that he is occupying it for such purposes.

Clearly there has been no production from the mine for many years. At most, Skidmore has done development work which may at some future time lead to an actual mining operation. However, there are no present plans to begin production. Even this activity has diminished and has been nonexistent since 1965 (or 1967, according to contestee's brief). At the time of the hearing, Skidmore hired several men, not miners, to do some repair work. There was no evidence as to the amount of time spent by miners on the claim after the extensive underground activity ended in 1965. Viewing the evidence most favorably to appellant merely warrants a conclusion that only a limited amount of development work is in progress without any foreseeable prospect of more intensive use in the future.

The Mammoth No. 1 contains two bunkhouses, an ore storage dump, and a tunnel access to the mine. Tr. 45. Even though mining activities have been curtailed, these facilities are all necessary and ready for the present activities on the patented claims. Therefore, that millsite was properly held valid.

Turning now to Nos. 3 and 4, we find that the improvements on them are not used or occupied in connection with Skidmore's operations. The necessity of No. 3 is cited only as a future ore storage dump while No. 4 contains a mill in such disrepair that large expenditures would be required to restore it to proper use. As we have seen, where the land is not being currently used for mining or milling purposes, the applicant must show occupation by improvement or other evidence of good faith intentions to use the land for mining or milling purposes in order to sustain his claim. United States v. S.M.P. Mining Co., supra. In light of the facts, Skidmore has not made an adequate showing of current need or good faith intentions of improving Nos. 3 and 4. Even if he were

presently operating the mine, millsites Nos. 3 and 4 would not be ready for use. Since operations have been suspended indefinitely, we cannot justify allowing Skidmore to receive a patent on these lands. 4/ Furthermore, the fact that these millsites are located in a national forest on lands desirable for recreational purposes places a burden on Skidmore to show a bona fide need for these lands. United States v. Langmade and Mistler, 52 L.D. 700, 704 (1929). This Skidmore has not done.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision by Judge Luoma is reversed for Mammoth millsites Nos. 3 and 4, and affirmed for Mammoth millsite No. 1.

Martin Ritvo, Member

We concur:

Frederick Fishman, Member

Joan B. Thompson, Member.

4/ In view of this determination we need not consider whether part of Mammoth No. 4 was open to location as a millsite in 1968. On July 31, 1958, there was published in the Federal Register a "Notice of Proposed Withdrawal and Reservation of Lands" which stated that the Department of Agriculture had filed an application to withdraw these and many other areas from all forms of appropriation under the General Mining Laws. 23 F.R. 5794, 5797 (1958). (Exhibit 11). The withdrawal has not been completed; however, notice of such an application on the tract books or official plats segregated the land to the same extent as the completed withdrawal. Circular 1982, August 12, 1957, amending 43 CFR § 295.11 (1957), now 43 CFR 2091.2-5.